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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 1309

THE KRESGE FOUNDATION, a Michigan corporation,
Petitioner,

vs.

LOUIS SCHLESINGER COMPANY,
a corporation of New Jersey,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT P. DOUGLASS,
Attorney for Petitioner,
550 Broad Street,
Newark, New Jersey, 07102.

Of Counsel:

McCARTER & ENGLISH,
550 Broad Street,
Newark, New Jersey, 07102.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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No.

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Petitioner,

v.

LOUIS SCHLESINGER COMPANY, a corporation of New Jersey,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Kresge Foundation, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above case on January 12, 1968.

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit, entered January 12, 1968, is reported 388 F. 2d 208. It is reproduced in Appendix A of this Petition.

The opinion of the United States District Court for the District of New Jersey, filed December 10, 1964, denying petitioner's motion to dismiss the action or quash the writ of attachment, is reported at 236 F. Supp. 373. The opinion of said District Court granting summary judgment in favor of petitioner, filed November 22, 1966, is reported at 260 F. Supp. 763.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 12, 1968 (Appendix A. *infra*). The jurisdiction of this Court is invoked under 28 U.S. Code §1254 (1).

Questions Presented

1. Whether a defendant's challenge to the jurisdiction of a Federal Court should not be considered and determined before rendering a decision adverse to the defendant.

2. Whether a Federal Court's jurisdiction in an attachment action, acquired by removal from a state court, survives the filing of an amended complaint setting forth a new cause of action, where no additional process has been served.

Statutes Involved

Rule 64 of the Federal Rules of Civil Procedure, dealing with attachment actions removed from a state court, provides as follows:

> "At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in

which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action."

Section 1450 of the Judicial Code, 28 U. S. Code §1450, provides as follows:

"Whenever any action is removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant in such action in the State court shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the State court.

All bonds, undertakings, or security given by either party in such action prior to its removal shall remain valid and effectual nowithstanding such removal.

All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court."

Statement of the Case

This case originated with the issuance of an order for attachment by the Superior Court of New Jersey on September 15, 1964, purportedly affecting certain New Jersey property of petitioner, The Kresge Foundation, a Michigan charitable corporation (hereafter referred to as "Kresge"). Said writ of attachment was obtained by respondent, Louis Schlesinger Company, a New Jersey corporation (hereafter referred to as "Broker"), by presenting to the court a complaint verified by affidavit dated September 11, 1964. This complaint and affidavit were subsequently filed (K. 346b to K. 359b).*

The substance of Broker's complaint was that Kresge had contracted with Broker on or about December 12, 1956 to pay a commission for Broker's services in procuring a tenant, Western Electric Company, for Kresge's New Jersey property, and that part of that contract was an agreement to pay additional commissions on any renewal or extension of the original lease. Broker alleged, by affidavit dated September 11, 1964, that Kresge had leased additional space to Western Electric Company, and that Broker was entitled to additional commissions therefor (K. 346b to K. 359b).

Kresge had never agreed to pay such additional commissions, but on or about June 9, 1964, it had in fact renegotiated its lease with Western Electric Company. This new lease covered three additional floors of the building, as well as the premises previously leased (K. 444b to K. 467b). However, Kresge and Western Electric Company, by mutual agreement, terminated this new lease, and in its place adopted a third lease, executed September 14,

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* "K" refers to Kresge's "Appendix to Appellee's Brief" part of the record certified to this Court by the Court of Appeals. "B" refers to Broker's "Appendix to Appellant's Brief", part of the same record.

1964, and dated June 9, 1964, covering the same premises, but wholly differing in the conditions, rental payments, and otherwise (B. 86a to B. 111a; K. 470b).

Kresge was never served with process in New Jersey, but received notice of the proceedings by mail. On October 7, 1964, Kresge petitioned for removal of the attachment suit to the United States District Court for the District of New Jersey on diversity jurisdiction. On October 13, 1964, Kresge moved to dismiss the action, and to quash the Writ of Attachment, on grounds that the original complaint and verifying affidavit had been defective, had failed to state a claim, and had therefore failed to invoke the jurisdiction of the New Jersey (and hence Federal) Court. This motion was denied, and the opinion denying it appears at 236 F. Supp. 373 (B. 1a to B. 2a).

However, on December 9, 1964, prior to the court's decision on this motion, Broker filed an amended complaint. The substance of this second complaint was that Kresge had not only leased additional space to Western Electric Company, but had also renewed the original lease for a longer term. This new complaint was based upon the September 14, 1964, lease, which had not been in existence when the affidavit to the original complaint was executed (B. 2a; B. 8a to B. 12a).

On February 21, 1966, Broker moved for summary judgment against Kresge. Kresge filed a cross-motion for summary judgment on April 1, 1966. These motions were heard together on June 24, 1966, and decided by opinion filed November 22, 1966 (reported at 260 F. Supp. 763), granting Kresge's motion and denying that of Broker (B. 6a to B. 7a).

Broker appealed to the United States Court of Appeals for the Third Circuit, which reversed the judgment of the

District Court and remanded for further proceedings. From this judgment entered January 12, 1968, the petitioner requested certification.

Reasons for Granting the Writ

The extent of Federal jurisdiction in attachment actions has not been considered by this Court since *Rorick* v. *Devon Syndicate,* 307 U. S. 299, 59 S. Ct. 877, 83 L. Ed. 1303 (1939); nevertheless it remains an important federal question which needs to be decided, especially since the 1963 amendment to Rule 4(e) (Fed. R. Civ. P.) creating original Federal jurisdiction in attachment.

Originally there was no Federal jurisdiction in attachment actions, except in actions under certain Federal statutes, and cases removed from the state courts. Now under Rule 4(e) (Fed. R. Civ. P.) an attachment suit may be begun in the Federal courts; however, as was held in the *Rorick* case, Federal jurisdiction depends upon local law. The Federal courts may attach what a state court might attach, and must dissolve the attachment if a state court would have done so. See *Dunn* v. *Printing Corp. of America,* 245 F. Supp. 875 (E.D. Penn. 1965).

The New Jersey Courts have held that attachment actions may not be amended to state a new cause of action, nor substantially to increase the damages claimed. Kresge argued that Broker's action should therefore be dismissed. The Court of Appeals, by its failure to decide this jurisdictional issue, has, by its silence, said in effect that Kresge could be compelled to defend any amended claim the Broker might raise, in whatever amount, so long as the original attachment substantially complied with local law.

It is well-settled under common law principles that a plaintiff in attachment who amends his complaint to state a new cause of action thereby releases the sure-

ties on any attachment bond, dissolves the attachment and defeats the jurisdiction of the court. See the extensive annotation on this point at 74 A. L. R. 912 (1931).

This rule applies equally to the Federal courts. In *Stanley Trading Co.* v. *Bensdorp, Inc.*, 95 F. Supp. 502 (D. Mass. 1950), the court held that the effect of amending a complaint would have to be determined by state law. If state law holds that the amendment states a new cause of action, then the Federal court would have to dissolve the attachment. See also *Hisel* v. *Chrysler Corporation*, 90 F. Supp. 655 (W. D. Mo. 1950) and *Tanko* v. *Saperstein*, 149 F. Supp. 317 (N. D. Ill. 1957).

New Jersey law is fairly represented by *Republic of China* v. *Pong-Tsu Mow*, 33 N. J. Super. 24, 108 A. 2d 891 (Law Div. 1954), in which a complaint in attachment was deemed not amendable to add a new count on a foreign judgment arising out of the same transactions set forth in the original complaint. The court held that such an action on a judgment is a separate, new and distinct action, and, in any case, the new damages demanded were $5,000,000 as opposed to $800,000 in the original affidavit in attachment. The court held that a complaint substantially increasing the damages, by itself, stated a new cause of action, and that a defendant who had appeared to defend an attachment suit for the lesser amount, could not be compelled to defend against the larger claim instead. See also *Schuster* v. *Schuster*, 9 N. J. Super. 11, 86 A. 2d 676 (App. Div. 1950).

In the present case, Broker amended its complaint to seek commissions on a different lease that did not even exist when it executed its original attachment affidavit. The commissions sought under the amended complaint were nearly double the amount which might have been

due under the first 1964 lease. The amended complaint also omitted one defendant, originally named as a joint debtor, and added a new claim for commissions on renewal of the 1957 lease (Compare K. 346b to K. 349b with B. 8a to B. 12a).

Kresge appeared for the limited purpose of defending its property against the claim set forth in the original complaint. It should not be compelled to defend against a claim that is twice as large, based on subsequent events.

In *Rorick* v. *Devon Syndicate,* 307 U. S. 299, 59 S. Ct. 877, 83 L. Ed. 1303 (1939) this Court considered an attachment action begun in the Ohio courts and removed to the Federal courts. Five years later the plaintiff filed an amended petition and obtained supplemental writs of garnishment, based on the same cause of action, against additional property of the defendant in Ohio. This Court held that Federal courts could issue such writs if Ohio courts could do so, and remanded for determination whether Ohio allowed it or not.

Even though Federal attachment jurisdiction depends upon State law, there has never been any determination in this case as to what New Jersey law will allow with respect to the amended complaint. The *Republic of China* case, *supra,* indicates that any substantial increase in damages is not permitted through amendment in attachment; nevertheless Broker here doubled the damages claimed, without additional process, and without jurisdiction *in personam,* and Kresge is expected to defend, and perhaps pay, this claim.

The District Court and Circuit Court both failed to decide this question of jurisdiction, although Kresge has raised it at every stage of the proceedings. By their

silence the Federal courts have permitted Broker to assert a new cause of action against Kresge, even though Kresge was never subject to the personal jurisdiction of the state or Federal courts. By their silence, the Federal courts have permitted Broker to begin a new action without service of process, and without the issuance of a new writ of attachment, in a manner that does not comply with state or Federal law.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

ROBERT P. DOUGLASS,
Attorney for Petitioner,
550 Broad Street,
Newark, New Jersey 07102

Of Counsel:

McCARTER & ENGLISH,
550 Broad Street,
Newark, New Jersey 07102

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16502

LOUIS SCHLESINGER COMPANY,
A CORPORATION OF NEW JERSEY,
Appellant,

v.

THE KRESGE FOUNDATION, A MICHIGAN CORPORATION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued October 16, 1967

Before HASTIE, FREEDMAN and SEITZ, *Circuit Judges.*

OPINION OF THE COURT

(Filed January 12, 1968)

FREEDMAN, *Circuit Judge.*

Appellant, Louis Schlesinger Company, a New Jersey corporation licensed as a real estate broker in New Jersey, brought this action against The Kresge Foundation, a Michigan corporation, for additional commissions because the tenant it procured for the Foundation's department store building at 715 Broad Street, Newark, New Jersey, later extended its term of occupancy and acquired additional space in the building.

In 1956 plaintiff brought Western Electric Company to the attention of defendant as a prospective tenant in the building. Before the terms of a lease were fully agreed

upon a controversy arose regarding plaintiff's commission. Plaintiff claimed the full commissions customarily paid in Newark, and defendant maintained that plaintiff was only entitled to a finder's fee because it had suggested the name of the prospective tenant. Discussions ensued between the parties in Newark and also by telephone and correspondence between Newark and Detroit. They resulted in the execution of a letter agreement dated December 12, 1956, but actually executed December 31, 1956, which provided for the terms of payment of plaintiff's commission.

Thereafter a lease between defendant and Western Electric Company was executed on February 15, 1957, which provided for the rental of two floors of the building for a term of ten years, and granted the lessee an option to renew for an additional five years and a right of first refusal of any additional space which became available during the term of the lease. A short time later, on April 12, 1957, defendant paid to plaintiff a commission in accordance with the letter agreement in the amount of $81,552.27.

The present controversy arose out of defendant's new lease to Western, dated June 9, 1964, before the expiration of the original ten year term. The new lease was for the original two floors and three additional floors of the building, for a term of five years, and required major rehabilitation and alteration of the demised premises at a cost of more than one million dollars.

Plaintiff, learning of the negotiations between defendant and Western for the additional space, gave notice of its claim for commission and after the new lease was executed brought suit in the Superior Court of New Jersey. Defendant removed the suit to the United States District Court for the District of New Jersey on the ground of diversity of citizenship.

The district court on consideration of extensive depositions and affidavits of the parties entered summary judg-

ment for defendant and dismissed the complaint.[1] The court held:

(1) The letter agreement was executed in Michigan and the statute of frauds of that state[2] applied and barred the suit because the letter agreement did not contain all the terms agreed upon, but made reference instead to the rates and rules of the Detroit Real Estate Board.

(2) The letter agreement required the payment of only one commission and did not justify a subsequent commission.

(3) In any event the payment of the original commission constituted an accord and satisfaction between the parties which barred the present action.

As a result of these views the district court did not pass upon the defenses that even if plaintiff's interpretation of the brokerage agreement was correct, the new lease did not fall within its terms; and that plaintiff was barred from recovery of commissions in New Jersey because it was not licensed as a real estate broker in Michigan.

I.

The vital part of the agreement, which is in the form of a letter from plaintiff, accepted by defendant, reads as follows: "Louis Schlesinger Company will accept and the Kresge Foundation . . . . will pay the real estate commission in accordance with the rates and rules published by the Detroit (Michigan) Real Estate Board, payable in the event of a closed lease with the Western Electric Company, said commission to be due and payable upon execution of the lease."

The applicability of the Michigan statute of frauds may well depend on the circumstances surrounding the

1 260 F.Supp. 763 (D.N.J. 1966). The district court had earlier denied defendant's motion to dismiss for technical inadequacies in the form of the complaint in the New Jersey court, 236 F.Supp. 373 (D.N.J. 1964). We agree with this holding.

2 Mich. Stat. Annot. Rev. 1953, § 26.922.

execution of the agreement. But even if the Michigan statute of frauds applies, there is no reason why the written rates and rules of the Detroit Real Estate Board which the letter agreement incorporated by reference should be rejected as not part of the agreement. A signed writing which clearly and unmistakably refers to an extraneous document which is incorporated in it by reference satisfies the Michigan statute of frauds.[3] This is also the general law in the United States.[4]

II.

Since the statute of frauds is not a bar to the plaintiff's action, we turn to the defense of accord and satisfaction.

There is nothing in the facts of record to show that any payment was made to plaintiff in settlement of the current dispute. Indeed, the transaction which gave rise to it had not yet come into existence when the payment of $81,552.27 was made. The payment was made under the letter agreement in satisfaction of plaintiff's claim for commission on the original lease.

It is the universal rule in this country, including Michigan and New Jersey, that an accord and satisfaction arises only where both parties intend the payment to terminate a then existing controversy.[5] This defense, therefore, is inadequate.

III.

The final ground of the decision of the district court was its interpretation of the letter agreement as providing for only one commission, which was the commission which fell due under the original lease. The court arrived at

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3 Janiszewski v. Shank, 230 Mich. 189, 202 N.W. 949 (1925); Beltsman v. Sherman, 224 Mich. 347, 194 N.W. 1003 (1923); see also Annot., Admissibility of Parol Evidence to Connect Signed and Unsigned Documents relied upon as Memorandum to Satisfy Statute of Frauds, 81 A.L.R.2d 991 (1960).

4 2 Corbin on Contracts, § 527 (1950).

5 See Durkin v. Everhot Heater Co., 266 Mich. 508, 254 N.W. 187 (1934); Kissell v. Myer & Bush Co., 96 N.J.L. 513, 115 Atl. 378 (1921); 6 Corbin on Contracts, § 1277 (1962).

this conclusion by emphasizing that plaintiff did not include in the letter agreement an explicit provision for a commission on renewal, and considered that it was the clear intention of the parties to use the Detroit rates and rules only as a formula for fixing the amount of commission due at the time of execution of the original lease.

As we have already indicated, the agreement must be read to include the rates and rules of the Detroit Real Estate Board which it incorporated by reference. They not only fix a schedule of rates, but also establish a series of rules. The rules equally with the rates are made part of the letter agreement and include the following provision:

> "LEASE WITH PRIVILEGE OF RENEWAL
>
> "(e) Where lessee avails himself of privilege of renewal or extension of lease, or takes on additional space under provisions of original lease, the negotiating broker shall be entitled to additional compensation at same rates as applied to original case, when and as said lessee avails himself of such privileges."[6]

The question therefore arises whether the new lease by defendant to Western fell within rule (e) of the Detroit Real Estate Board. If it did, plaintiff would be entitled to an additional commission on the new lease. Because of its view that rule (e) was not incorporated in the letter agreement the district court did not determine whether the new lease for the enlarged space constituted lessee's

---

6 Other provisions which bear on our problem although less directly, are the following:

> "(f) On leases bearing a cancellation clause, the broker shall be entitled to compensation at regular rates, based upon the full term of the lease.
>
> . . .
>
> "(j) On leases containing option to purchase, exercised on or before ten (10) years, the commission on the sale shall be payable when the option to purchase is exercised, whether or not the purchase is made exactly on the terms stipulated in the lease, and shall be the regular rate for negotiating the sale of the property in question, less the unearned commission for the unexpired portion of the lease, but in no event shall it be less than the commission for negotiating the lease."

availing itself of the "privilege of renewal or extension" of the original lease, or the taking on of "additional space under [the] provisions of [the] original lease," which by virtue of rule (e) would entitle plaintiff to additional compensation at the rates which applied to the original lease. The decision of this question must be made in the light of the provisions of ¶ 3 of the original lease, which granted to the lessee an "option to renew" the lease for an additional period of five years and also conferred on the lessee "the right of first refusal, to rent *any other space* in the building," which was available for leasing and had become vacant during the term of the lease.[7] The parties to the original lease "terminated" it when they executed the new lease for the enlarged space.

Accordingly, there is presented a factual question whether the new lease terminating the old lease and giving the tenant additional space in the building for a term of different length at a different rent and requiring substantial improvements to be made on the property, considered in the light of the provisions of ¶ 3 of the original lease, fell within the Detroit Real Estate Board's rule (e). This ultimate factual issue was not decided. We cannot resolve the question simply by placing the new lease, in the form in which the lessor and lessee cast it, alongside of rule (e) and seeing if the language of one matches the other. It is from the nature of the transaction itself and the circumstances which surround it, which will disclose the reality of the action of the parties and the intention with which they documented their transaction in the form it ultimately took, that this factual question must find its answer.

While the depositions and affidavits have presented many facts which are not in dispute, yet the ultimate in-

7 The provision reads as follows: "The lessee shall have the *option to renew* this lease for an additional period of five years upon the same terms and conditions upon written notice [etc.]. . . . . The lessor shall offer first to the lessee, which shall have the right of first refusal, to rent *any other space* in the building, and available for leasing, of which the demised space is a part, which may become vacant during the term of this lease at a rental to be agreed upon by the parties."

ferences to be drawn from these facts are the essence of the controversy which has ignited this litigation. Without findings of fact on the inferences which are to be drawn from the circumstances as well as from the documents there is no foundation on which to rest a judgment whether plaintiff's claim is well-founded.

What seems to be a question of law as to the right of a broker to additional compensation on the renewal or extension of the lease for which he was the procuring agent is a matter which is not free from difficulty.[8] It is brought to the courts most frequently where the subsequent conduct of the owner and tenant is molded in a form which does not on its face establish liability for additional commission. It is evident in such cases that the interest of the parties to the lease lies in avoiding the obligation to pay additional commission and from this arises at once the factual question whether what is otherwise described by the owner and lessee is in reality a transaction which falls within the language of the real estate broker's contract with the owner. Here the circumstances which surrounded the making of the new lease which terminated the original lease must be considered in making the factual determination whether the new lease fell within rule (e) of the Detroit Real Estate Board. The determination of this question requires consideration of the intention of the parties as derived from their conduct, and the inferences which are to be drawn from their intention. The depositions already reveal that the core of the dispute contains a sharp contradiction between the parties.

Summary judgment is not an appropriate instrumentality to determine factual intention and inferences. See *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962).[9] It is inappropriate in the circumstances of the present case.

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8 See Annot., Broker's Right to Commission on Renewal, Extension, or Renegotiation of Lease, 79 A.L.R.2d 1063 (1961).

9 See also Severson v. Fleck, 251 F.2d 920 (8 Cir. 1958); Cram v. Sun Insurance Office, Ltd., 375 F.2d 670, 673 (5 Cir. 1967).

Appendix A

IV.

The effect of the Michigan statute [10] making unlicensed real estate brokerage transactions illegal and the doctrine of that state rendering such contracts unenforceable,[11] which the district court did not decide, will be reached if the plaintiff's claim is otherwise established. The Michigan courts have not yet had occasion to decide whether they would extend the rule to cases such as this, which involves the activity of a broker duly licensed in New Jersey, in relation to real estate situated in New Jersey. There will be involved also the question whether the New Jersey courts would apply any Michigan sanction of unenforceability to a transaction such as this.[12] This question is entangled in the precise details of the broker's activities and where they occurred, and therefore the factual circumstances will lend their coloration to the legal question which may require decision.

It follows that the summary judgment for defendant and the dismissal of the complaint must be set aside so that the case may proceed to trial.

The judgment will be vacated and the cause remanded for further proceedings.

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10 Mich. Stat. Annot. Rev. 1953, §§ 19.791-93.

11 Jaenicke v. Davidson, 290 Mich. 298, 287 N.W. 472 (1939); Krause v. Boraks, 341 Mich. 149, 67 N.W.2d 202 (1954).

12 Compare Tanenbaum v. Sylvan Builders, Inc., 29 N.J. 63, 148 A.2d 176 (1959).

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16,502

LOUIS SCHLESINGER COMPANY,

Appellant,

vs.

THE KRESGE FOUNDATION, a Michigan Corporation and KRESGE DEPARTMENT STORE, INC., a Delaware Corporation.

(D. C. CIVIL ACTION No. 932-64)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE — DISTRICT OF NEW JERSEY

Present: HASTIE, *Chief Judge* and FREEDMAN and SEITZ, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the — District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed December 27, 1966, be, and the same is hereby vacated, with costs, and the cause remanded for further proceedings in accordance with the opinion of this Court.

ATTEST:

M. ELIZABETH FERGUSON
Chief Deputy Clerk.

January 12, 1968.

APPENDIX C

Opinion of the United States District Court for the District of New Jersey

Appearances:

GREENBAUM & GREENBAUM, ESQS.
By ROBERT S. GREENBAUM, ESQ.
Attorneys for Plaintiff

McCARTER & ENGLISH, ESQS.
By ROBERT P. DOUGLASS, ESQ.
Attorneys for Defendants

WORTENDYKE, District Judge:

In this action the plaintiff, a New Jersey licensed real estate broker, seeks commissions for services alleged to have been rendered in connection with the letting by the defendant, The Kresge Foundation (hereinafter referred to as the Foundation), of additional space in the Foundation's department store building at 715 Broad Street, Newark, New Jersey to Western Electric Company (hereinafter Western), an existing tenant in said building pursuant to an agreement between the Foundation and the plaintiff, dated December 12, 1956 (hereinafter referred to as the 1956 commission agreement).

The action was commenced by the filing of a complaint in the Superior Court of New Jersey, Law Division, Essex County, from which it was removed to this Court by reason of diversity of citizenship between the plaintiff and the Foundation; the requisite jurisdictional amount being conceded.

The complaint alleges that on December 12, 1956 the defendants, the Foundation and Kresge Department Store, Inc. (hereinafter Kresge), entered into a written agreement with the plaintiff to pay commissions to the latter

for services rendered in procuring Western as a tenant in the department store building aforesaid; "• • • said commissions to be in accordance with the rates and rules published by the Detroit (Michigan) Real Estate Board which were in effect at that time." The Detroit rules provided as follows:

"2. FOR NEGOTIATING LEASES:

The commission for negotiating leases shall be as follows:

5% of the aggregate rental for one year or less, but in no instance less than one-half of the first month's rent. . . . $25.00

On leases for more than one year 5% of the aggregate rental for the first year and 2½% of the aggregate rental for the next four years, and 2% of the aggregate rental for the next five years, and 1% of the aggregate rental for the balance of the term up to and including the 50th year.

LEASE WITH PRIVILEGE OF RENEWAL

(c) Where lessee avails himself of privilege of renewal or extension of lease, or takes on additional space under provisions of original lease, the negotiating broker shall be entitled to additional compensation at same rates as applied to original case, when and as said lessee avails himself of such privileges."

The complaint further alleges the following: (1) On or about February 15, 1957, through the negotiations of plaintiff, Western entered into a lease with the defendant Foundation for a period of ten years for space on the eighth

and ninth floors of the department store building, said term to commence on the date of delivery of one-half of the leased space on the eighth floor. (2) On or about April 12, 1957, the Foundation paid to the plaintiff $81,552.27 for services rendered in connection with the successful negotion of the aforesaid lease. (3) On or about June 9, 1964, Western acquired additional space on three additional floors of the building.[1] Plaintiff claims a right to a commission in connection with this additional letting, to include interest.

Process upon the complaint as filed in the Superior Court was by way of a Writ of Attachment which was executed by levy upon the Foundation's department store. An order denying defendant's motion to dismiss or to quash the Writ of Attachment was made by this Court on December 16, 1964 for the reasons stated in this Court's Opinion filed December 10, 1964.

Plaintiff filed an amended complaint against the defendant Foundation on December 9, 1964 in which plaintiff again alleges the 1956 commission agreement between the Foundation and plaintiff; the provisions of the rules of the Detroit Real Estate Board; and the ten-year lease of February 15, 1957, between the Foundation and Western, procured through the negotiations of the plaintiff. Annexed to the amended complaint is a copy of the lease of February 15, 1957, which granted to the leasee a renewal option for an additional five year period, and a right of first refusal to lease any additional space in the building which

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[1] This additional letting related to floors five, six, and seven. There are *two* June 9, 1964 lease agreements; the one controlling in this case was recorded in the Office of Register of Deeds and Mortgages, Essex County, New Jersey.

might become available during the ten-year term of the lease, at a rental to be agreed upon by the parties. The amended complaint again alleges the April 12, 1957 payment of $81,552.27 by the Foundation to the plaintiff, and the acquisition by Western of the additional space under the lease of June 9, 1964. Plaintiff alleges that it was not advised of the pendency of negotiations leading up to the execution of the 1964 lease and was thereby excluded from participation in said negotiations.

The plaintiff charges the following in its amended complaint: (1) "To the extent that the 1964 lease provides for a term beyond the expiration date of the ten year tenancy provided for in the 1957 lease, such taking constitutes a renewal of the lease as to the eighth and ninth floors by the tenant exercised pursuant to the privilege of renewal in the 1957 lease." (2) "The letting aforesaid as to the fifth, sixth and seventh floors constitutes the taking of additional space under the provisions of the original lease agreement of 1957." Accordingly, plaintiff seeks "* * * the full amount of commissions due and payable upon the execution of the lease agreement of June 9, 1964" pursuant to the 1956 commission agreement and the rates and rules of the Detroit Real Estate Board.

The defendant Foundation admits that the 1956 commission agreement was duly executed and that the Detroit rules as set forth in the complaint were published March 15, 1956. The Foundation also admits its entry into the 1957 lease with Western; the payment by defendant to plaintiff of $81,552.27 on April 12, 1957; and the execution of the 1964 lease with Western. In a series of affirmative defenses, the defendant also pleads as follows:

Appendix C

(1) Lack of subject matter jurisdiction in the Court because of the impropriety of the issuance of the Writ of Attachment.

(2) Lack of personal jurisdiction over the Foundation because it was not served with process within the District of New Jersey.

(3) Lack of jurisdiction in this Court over the person and property of the Foundation because no process other than the Writ of Attachment was served and because that Writ was improperly issued.

(4) Lack of jurisdiction in the Court as to the person and property of the Foundation because of impriety in the issuance of the Writ, lack of service of process within the District, and absence of process other than an improperly issued Writ.

(5) The payment of $81,552.27 on April 12, 1957 constituted an accord and satisfaction of the mutual rights and obligations of the parties arising out of services rendered by the plaintiff in connection with the lease of February 15, 1957.

(6) The payment aforesaid constituted payment in full; and the amount thereof was negotiated and calculated on the basis of the Detroit rates.

(7) The lease of February 15, 1957 was not negotiated by plaintiff.

(8) The services of plaintiff in connection with the lease of February 15, 1957 were not those of a negotiating broker entitled to a commission.

(9) Plaintiff's attempt to negotiate a lease between the Foundation and Western was ineffective. The

terms of the letting were negotiated directly with Western, without plaintiff's services. Before reaching an agreement with Western, plaintiff and defendant negotiated between themselves the matter of plaintiff's compensation for its alleged services and plaintiff agreed to accept, and did accept, said negotiated amount by its letter of December 12, 1956. The amount paid by defendant on April 12, 1957, calculated in accordance with the agreement of December 12, 1956, was accepted by the plaintiff.

(10) Although plaintiff was not licensed as a real estate broker in the State of Michigan, it nevertheless acted as such in that State in violation of the State law of Michigan by offering to lease real estate for others and procuring defendant's execution of the commission agreement which thereby was rendered illegal, void and unenforceable.

(11) Plaintiff at all times mentioned in the amended complaint was not a licensed real estate broker in the State of Michigan but nevertheless entered into the commission agreement in that State with a citizen thereof. The agreement was accordingly illegal, void and unenforceable.

(12) The agreement of June 9, 1964 did not constitute an availing by Western, as lessee under the 1957 lease, of a privilege of renewal or extension of the lease.

(13) The agreement of June 9, 1964 was not a taking on by Western, as lessee under the 1957 lease, of additional space under the provisions of said lease.

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(14) The agreement of June 9, 1964 was not an availing by Western, as lessee under the 1957 lease, of any privilege contained in said lease.

(15) The agreement of June 9, 1964 was not an availing, by the lessee in the 1957 lease, of any privilege or provision negotiated by plaintiff and contained in said lease.

(16) The agreement with Western of June 9, 1964 was not the result, directly or indirectly, of any services of plaintiff.

(17) On or about April 27, 1964, the Foundation contracted to sell all of its rights, title and interest in and to the premises which were the subject matter of the commission agreement, and thereby terminated the liability of defendant under said agreement.

(18) The agreement of June 9, 1964 between the Foundation and Western was executed by the Foundation as holder of the legal title on behalf of the equitable owner, and the Foundation acted as an agent of such equitable owner in executing the June 9, 1964 agreement.

THE 1957 LEASE

By the provisions of a written lease dated February 15, 1957, drawn by New Jersey counsel for the Foundation, the latter corporation leased to Western floor space on the eighth and ninth floors of the lessor's department store building located at 715 Broad Street, Newark, New Jersey, for a term of ten years to commence on the date of de-

livery of possession by lessor to lessee of one-half of the space on the eighth floor. The lease granted to the tenant an option to renew for an additional period of five years upon the same terms and conditions, upon written notice thereof to the lessor at least nine months prior to the expiration of the term of the 1957 lease. The instrument further provided as follows:

> "The Lessor shall offer first to the Lessee, which shall have the right of first refusal, to rent any other space in the building, and available for leasing, of which the demised space is a part, which may become vacant during the term of this lease, at a rental to be agreed upon by the parties. The Lessor's offer shall be in writing and must be accepted by the Lessee by notice in writing to the Lessor within thirty (30) days after receipt of said offer."

THE 1964 LEASE

On October 1, 1964, there was recorded in the Office of Register of Deeds and Mortgages for Essex County, New Jersey, in Book 4047 of Deeds, commencing at page 350, a written lease dated June 9, 1964 from the Foundation, as lessor, to Western.

This lease by its terms "supersedes" the 1957 lease, and the parties mutually agreed that the 1957 lease was thereby terminated and no longer in effect, except that any advance payments of rent made under the 1957 lease should be credited to the first rental payments due under the 1964 lease. The latter lease covers the fifth, sixth, seventh, eighth and ninth floors of the building. The term of the lease was to "* * * commence immediately and shall ex-

tend for a period of five (5) years from the date of final delivery of all space hereby demised in accordance with the schedule hereinafter set forth." The 1964 lease also provided that the lessee should pay to the lessor $1,975,000 toward the cost and expense of work to be performed by the lessor for the lessee in the demised premises. After final delivery of all space demised by lessor to lessee, the parties would enter into a recordable agreement expressing the actual date of the commencement of the five year term. Of the demised premises, possession of the eighth and ninth floors of the building was agreed to be delivered immediately upon the execution of the lease.

THE $81,552.27 PAYMENT OF APRIL 12, 1957

In the affidavit of William H. Baldwin, a trustee of the Foundation, sworn to March 28, 1966, and filed in connection with the Foundation's opposition to plaintiff's motion for summary judgment, it appears that in July, 1963, he was entrusted with the responsibility of disposing of the department store business known as Kresge-Newark, Inc. and the building occupied by it at 715 Broad Street, Newark, New Jersey, a portion of which was leased by the Foundation to Western. On March 1, 1964, Baldwin was advised by Western of the latter's desire to discuss its tenancy. Baldwin states that on March 9, 1964 he was in communication with Western "* * * regarding their taking of additional space and to see if we could arrive at some conclusions about a renewal of the lease for the 8th and 9th floors * * *" which Western then occupied under their lease of February 15, 1957. In consequence of Baldwin's further conference with Western's representatives on March 17, 1964, he was convinced that Western was not interested in renewing the existing lease for the eighth and

ninth floors nor in taking additional space unless the Foundation was prepared to meet Western's "• • • unique and extraordinary requirements". There was at this time no space vacant and available for letting in the building. Numerous improvements in the building were required by Western as a condition to its taking of the fifth, sixth and seventh floors in addition to the eighth and ninth floors, and these alterations were estimated to cost approximately $1,000,000. Baldwin's affidavit continues: "Eventually new lease arrangements were entered into as evidenced by the 'Old New Lease' and the 'New New Lease'[2] providing substantially for all of the above listed [Western] requirements. Insofar as Kresge Foundation was concerned, the new lease arrangements were an outgrowth of the decision to dispose of the [department store] business and building, and insofar as Western Electric was concerned, it was clear to me that it was an outgrowth of their decision to consolidate, if not at the Kresge location, at some other location." Baldwin contends that the new lease arrangements can in no sense be regarded as Western's exercise of the option to renew the 1957 lease, or as the taking of space available for leasing which became vacant during the term of the 1957 lease. Baldwin annexes to his Affidavit as Exhibit B the "Old New Lease" and as Exhibit C the "New New Lease" referred to in his affidavit. Each exhibit bears the same date and recites that it was executed on the day of its date. Lessor's corporate acknowledgment was made on September 14, 1964 and that of lessee on September 8, 1964.

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[2] The "New New Lease" is the recorded instrument referred to in footnote 1.

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Appendix C

With its letter, dated April 12, 1957, the Foundation transmitted a check in the amount of $81,552.27 payable to Schlesinger "in full payment for your [plaintiff's] services rendered in connection with the lease between the Foundation and Western Electric Company dated February 15, 1957 covering the eighth and ninth floors of the premises located at 715 Broad Street, Newark, New Jersey." The amount of that check, as shown by the calculations set forth in the letter, was computed by multiplying the total rental for respective lease periods by the applicable percentages as prescribed by the Detroit rates. I find therefore that the parties mutually recognized the validity of the 1956 commission agreement and that the payment of $81,552.27 on April 12, 1957 by the Foundation to the plaintiff was in full discharge of the Foundation's obligation under that agreement with respect to the 1957 lease. I conclude therefore that, upon the receipt by plaintiff of the payment of its commission, there terminated all further rights and obligations under the 1956 commission agreement in and upon the respective parties thereto.

CONFLICT OF LAWS

In this case, jurisdiction exists by virtue of diversity of citizenship, and the conflicts rules to be applied are those of the forum State, New Jersey. *American Plan Corp.* v. *State Loan & Finance Corp.*, 365 F. 2d 635, 637 (3rd Cir. 1966) citing *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487 (1941). This being so, the interpretation to be placed upon the 1956 commission agreement, which is a Michigan contract, and the determination of the applicability of the Michigan Statute of Frauds[3] to this commission agreement

[3] C.L. 1948, §566.132; Stat. Ann. 1953 Rev. §26.922.

are questions of conflict of laws, and must be determined by applying the conflict of laws rules which prevail in New Jersey. *Klaxon Co.* v. *Stentor Elec. Mfg. Co., supra* at 496. Resort to the pertinent conflict of laws rules of New Jersey is made in order to ascertain the law of Michigan. *Waggaman* v. *General Finance Co.*, 116 F. 2d 254, 257 (3rd Cir. 1940).

Looking to New Jersey law, the 1956 commission agreement is to be construed according to the law of Michigan. *Polyckronos* v. *Polyckronos*, 17 N. J. Misc. 250, 253, 8 A. 2d 265, 269 (Court of Chancery of New Jersey 1939), cited with approval in *Lind* v. *Schenley Industries, Inc.*, 278 F. 2d 79, 84 (3rd Cir. 1960), cert. denied 364 U. S. 835 (1960). Such contractual interpretation includes a consideration of the applicability of the Michigan Statute of Frauds. *Dacosta* v. *Davis*, 24 N. J. L. 319, 328 (N. J. Sup. 1854), cited with approval in *Eliscu* v. *Fiber*, 157 F. 2d 136, 138 (3rd Cir. 1946).[4] The Court may inform itself of Michigan Law in such manner as it deems proper. *M. N. Axinn Co.* v. *Gibraltar Development*, 45 N. J. Super. 523, 535, 133 A. 2d 341, 347 (1957) citing Uniform Judicial Notice of Foreign Law Act, N.J.S.A. 2A :82-28.

PLAINTIFF'S CONTENTIONS

Plaintiff seeks to construe the 1956 commission agreement as extending to the 1964 lease, contending that (1) the 1956 commission agreement purports to incorporate by ref-

[4] Note that in *Dacosta, supra*, the fact, that the place of performance and of the situation of the subject-matter of the contract in a foreign State, can give no validity to a contract void under the statute of frauds of the State where made.

erence the Detroit rates and rules, and (2) the 1964 lease was a renewal of Western's tenancy of floors eight and nine, and also created a tenancy in additional space on floors five, six, and seven of the building.

As to incorporation by reference of the Detroit rates *and rules* into the 1956 commission agreement, it is clearly shown from a reading of plaintiff's pretrial memorandum, at page four, that the parties sought to resolve *only the amount* of commission to be paid for plaintiff's services in procuring a tenant for the Foundation's building. For the purpose of computing this amount, the Detroit rates were utilized. There is no indication that the parties intended to incorporate other provisions of the Detroit rules. At this same page in plaintiff's pretrial memorandum, plaintiff stated that it had indicated to the Foundation an intention to be protected as to "* * * the payment of future commission in the event of any renewal or taking of additional space by Western * * *. This principle met with no objection from Howard C. Baldwin, the sole subject matter of the dispute being the rate at which commission would be paid." However, such intention is not stated in the 1956 commission agreement.[5] It is well-settled that parol evidence will not serve to insert such an intention;[6] nor will this Court attempt to re-write the contract between

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[5] This 1956 commission agreement was accepted in Michigan by the Foundation; hence, it is a Michigan contract and governed by Michigan law.

[6] See *Brady* v. *Central Excavators, Inc.*, 316 Mich. 594, 25 N. W. 2d 630, 635 (Supreme Ct. of Mich. 1947); *Tunley* v. *Beall*, 323 Mich. 108, 34 N. W. 2d 477, 479 (Supreme Ct. of Mich. 1948). The parol evidence rule is given a more strict interpretation where a writing is required by statute.

the parties. The plaintiff could have specifically protected an interest in additional commissions by inserting a proper provision in the commission agreement. See *Plumbing Industry Program, Inc.* v. *Good*, 120 So. 639, 641 (Dist. Ct. of Appeal of Fla., 3rd Dist. 1960), reh. denied June 7, 1960). Further, under Michigan law, "• • • Every agreement, promise or contract to pay any commission for or upon the sale of any interest in real estate • • •" is void unless in writing and signed by the party to be charged therewith. *C.L. 1948, §566.132; Stat. Ann. 1953 Rev. §26.922.* A lease for a term of years is a sale of an interest in real estate within the meaning of the Michigan statute above-cited. *Hannah Real Estate Exch.* v. *Traub*, 217 Mich. 162, 185 N. W. 706, 707 (Supreme Ct. of Mich. 1921). Therefore, in order to find that plaintiff is entitled to the relief sought here, there must be shown a written instrument to that effect, signed by the Foundation. *Voth* v. *Hackley Union National Bank of Muskegon*, 353 Mich. 596, 91 N. W. 2d 857, 861 (Supreme Ct. of Mich. 1958). Thus, it appears that plaintiff's only possible valid claim to a renewal commission must of necessity be based upon the language in the 1956 commission agreement, i.e., "• • • will pay the real estate commission in accordance with the rates *and rules* published by the Detroit (Michigan) Real Estate Board • • •". (italics supplied) The *rules* of the Detroit Real Estate Board provide, in pertinent part, as follows:

"LEASE WITH PRIVILEGE OF RENEWAL

(c) Where lessee avails himself of privilege of renewal or extension of lease, or takes on additional space under provisions of original lease, the negotiating broker shall be entitled to addi-

tional compensation at same rates as applied to original case, when and as said lessee avails himself of such privileges."

It would appear, from a bare reading of the above-quoted portion of the Detroit rules that, since the 1956 commission agreement appears to incorporate the Detroit rates *and rules,* the parties in this case would be bound by the Detroit rules, especially the above-quoted portion, as such rules affect the 1956 commission agreement in regard to commissions. This cannot be so, based upon the clear intent of the parties and the application of the Michigan Statute of Frauds, *supra.*

As to the second contention of plaintiff, that the 1964 lease was a renewal of Western's tenancy of floors eight and nine, and the taking of additional space as to floors five, six, and seven, there is no need to address myself to these contentions for the reason that there would be no entitlement to renewal commissions in any event, for the reasons hereinbefore stated.

However, I shall make this observation, based upon a more thorough study of the specific provisions of the 1957 and 1964 leases:

The 1964 lease, by its terms in paragraph No. 1, seeks to "supersede" the 1957 lease. However, upon further reading of the 1964 lease, it is evident that the intent of the parties to "supersede" the 1957 lease was at best qualified and conditional. For example in the third paragraph of paragraph No. 2, the 1964 lease states: "* * * in which event the lease of February 15, 1957 shall be automatically reinstated to the same effect as if never terminated hereby". To the same effect, in the fifth paragraph of para-

graph No. 2, where the 1964 lease states: "In the event of such termination the lease of February 15, 1957 shall be reinstated in full force and effect as of the date of such termination." It is therefore evident from these provisions of the 1964 lease that the parties intended, in paragraph No. 1 of this lease, to terminate the 1957 lease *only* in a qualified and conditional way, contingent upon Western's (lessee) approval of the work to be done in the department store building pursuant to the 1964 lease. Further, Western did not give, prior to the expiration of the term of the 1957 lease, written notice to the Foundation of Western's intention to exercise the option contained in the 1957 lease.

DEFENDANT'S CONTENTIONS

The defendant has affirmatively pleaded numerous separate defenses. The first four of these separate defenses consist of a reiteration of the grounds of defendant's motion to dismiss the complaint which the Court overruled in its Opinion filed December 10, 1964.

Defendant further affirmatively pleads that the payment, made by the Foundation to plaintiff on April 12, 1957, in the amount of $81,552.27 was in satisfaction of the mutual rights and obligations of the parties arising out of services rendered by the plaintiff in connection with the 1957 lease. With this contention the Court agrees, as it does with the related contention, that the payment was computed in accordance with the Detroit rates. The Court, however, disagrees with defendant's contention that the 1957 lease was not negotiated by the plaintiff and that any services of the plaintiff in connection therewith were not those of a negotiating broker entitled to a commission.

Appendix C

The remaining affirmative defenses pleaded by the defendant in its answer to the amended complaint, commencing with the ninth separate defense thereto, do not require consideration in view of the Court's conclusion.

I conclude that the 1956 commission agreement does not create in the plaintiff any right to a commission in regard to the 1964 lease. The motion of the defendant Foundation for summary judgment against the plaintiff Louis Schlesinger Company must prevail. Plaintiff's motion for summary judgment against the defendant must be denied.

Let an order in conformity with the foregoing opinion be presented.

REYNIER J. WORTENDYKE, JR.
Judge, United States District Court

APPENDIX D

Opinion of Wortendyke, D. J., Denying 1964 Motion to Dismiss, etc.

Appearances:

GREENBAUM & GREENBAUM, Esqs.,
Attorneys for plaintiff,
By: ROBERT GREENBAUM, Esq.

McCARTER & ENGLISH, Esqs.,
Attorneys for defendant The Kresge Foundation,
By: JAMES R. E. OZIAS, Esq.

WORTENDYKE, District Judge:

This diversity action was removed to this Court after having been instituted in attachment in the Superior Court of New Jersey. One of the defendants, The Kresge Foundation, hereinafter Foundation, a Michigan corporation not registered or licensed to transact business in the State of New Jersey, has moved this Court for an order dismissing the action as to movant, or, in lieu thereof, quashing the writ of attachment issued against the property of Foundation. Levy was made under the writ upon a mercantile retail department store building and premises owned by Foundation in the City of Newark, and the lien of the levy was released by the filing of an appropriate bond before the transfer to this Court was effected.

Movant urges in support of its motion that this Court does not have jurisdiction over the defendant or its property because the New Jersey courts, upon whose jusrisdiction the Federal Courts must rely after removal, *Lambert v. Baltimore & Ohio R.R. Co.*, 258 U. S. 377 (1921), did not acquire jurisdiction either by virtue of the attachment proceedings or by personal service of process. The plaintiff has not shown that personal service was effected on the de-

fendant, so the matter in issue is reduced to the propriety and efficacy of the attachment proceedings.

Basically the moving defendant's argument that these attachment proceedings are fatally defective is, generally, that the writ of attachment was not issued in conformity with the applicable New Jersey Statutes or Rules of Court and, more specifically, that the attachment action was not commenced by filing a complaint as N.J.R.R. 4:77-3 provides and that *prima facie* proof of the cause of action was not submitted in support of the State Court's Order of Attachment as required by N.J.R.R. 4:77-7(a).

The motion was duly briefed and fully argued by both parties thereto and affidavits in opposition to the motion have been filed with the Court. At the conclusion of the oral arguments decision was reserved and is now embodied in this opinion.

The record discloses that the writ of attachment was issued pursuant to an order of the Superior Court of New Jersey, made September 15, 1964, upon a complaint, verified by affidavit. Plaintiff represented that Foundation is a trustee corporation of the State of Michigan, not authorized to do business in New Jersey and has no agent or office in the State of New Jersey. Plaintiff, a New Jersey real estate brokerage corporation claims to be entitled to commissions based upon the rent reserved in a five year lease (hereinafter described as the subsequent lease) of space from Foundation in the department store building hereinabove mentioned. Plaintiff's claim is based upon the existence of the subsequent five-year lease, in conjunction with the brokerage agreement associated with an earlier lease agreement (hereinafter designated as the original lease). Plaintiff has negotiated this earlier lease for the

moving defendant with the Western Electric Company, the same tenant now holding under the subsequent lease. The original lease had covered a substantial portion of the premises demised under the subsequent lease during the years immediately preceding the entry into the subsequent lease. The original lease remained in effect until the subsequent lease was entered into.

The complaint alleges that some time in June, 1964, Western Electric Company became a tenant of additional space on three other floors of the department store building under the terms of a lease agreement (the subsequent lease) unknown to the plaintiff at the time the complaint was filed. Plaintiff says that on May 11, 1964, when it learned of a proposed sale of the building b. and p. premises, it communicated with Foundation and with Kresge Department Store, Inc., asserted its right to commission in connection with the leasing of the additional space in the building to the Western Electric Company, and inquired respecting the terms of the lease agreement covering the additional space. Plaintiff received no response to its said notice and inquiry and charges that, pursuant to the provisions of the original commission agreement dated December 12, 1956, Foundation and Kresge Department Store, Inc. have become jointly and severally obligated to the plaintiff for additional commissions resulting from the execution of the subsequent lease.

The action was commenced in attachment in the New Jersey Superior Court. After the defendants had posted bond to relieve the real property attached under the writ, the defendant Foundation removed the cause to this court for diversity, and brought the present motion to dismiss the action and quash the writ of attachment.

Appendix D

Since *in personam* jurisdiction has not been claimed by the plaintiff, the existence of jurisdiction depends on the validity of the attachment. Foundation denies the validity of the attachment, and contends that the writ was not issued in conformity with applicable New Jersey statutes and rules of court.

The movant first contends that the writ should be quashed because the procedure followed in obtaining it failed to conform with N.J.R.R. 4:77-3 in that the complaint which, with the verifying affidavit, was treated by the Judge as the basis for the making of his order for the issuance of the writ, had not been "filed" as the term is defined in N.J.R.R. 4:5-6(a). That cited Rule provision requires generally that the filing of pleadings be effected with the Clerk of the Court but that a Judge thereof may permit the original and a copy of a pleading to be filed with him, in which event, he or someone at his direction, "shall note thereon the filing date with the initials of his name and office, and he shall forthwith forward the same to the clerk for filing." It is conceded in this case that the complaint was left with the State Court Judge who imprinted his stamped name and date upon the complaint. This is an indication that the complaint was filed with him pursuant to the intention of counsel in presenting it to him. I consider that the complaint was duly filed. The record also discloses that on September 30, 1964, the Judge who had ordered that the writ issue entered an order *nunc pro tunc* that the complaint and supporting affidavit be filed. Such was done. There has been no showing that the moving defendant has been or will be in any way prejudiced by the failure of the plaintiff to file the complaint with the Clerk prior to applying for the Court's

order for the writ, or by any delay in the actual receipt by the Clerk of the complaint and affidavit which were actually filed with him in due course. The order for the writ was not procedurally invalid.

Since the procedure to obtain a writ in the New Jersey Superior Court is governed by the New Jersey Court Rules, it must be liberally administered, and where strict adherence thereto will work injustice, they should be relaxed, N.J.R.R. 1:27A. Furthermore the statute establishing the procedure in attachment in New Jersey, N.J.S.A. 2A:26-1 *et seq.* provides in its opening section:

> "This chapter shall be liberally construed, as a remedial law for the protection of resident and non-resident creditors and claimants."

Therefore, even if the complaint in the present case was not strictly "filed" as required by the provisions of the applicable Rule, the liberal construction directed by the statute and the rules protects the complaint against dismissal and the writ from being quashed. See *Hillside National Bank* v. *McGruder*, App. Div. 1953, 28 N. J. Super. 340, 343. Finally, the corrective *nunc pro tunc* order made by the Judge who had made the order for the writ, while the cause was still within the jurisdiction of the New Jersey Court, eliminated any technical invalidity which might have been inferrable from the lack of a strict "filing" of the complaint at the time the application for the writ was made. See *Seiden* v. *Fishtein*, App. Div. 1957, 44 N. J. Super. 370.

The primary argument of the moving defendant, however, is not directed to the issue of adequate filing, but to the question whether the complaint and supporting affi-

davits evince *prima facie* proof of the plaintiff's claim. The New Jersey rules require such a showing of *prima facie* proof in order for the writ of attachment to be valid, N.J.R.R. 4:77-7. The first issue presented in this regard is whether the supplementary affidavits, allowed under N.J.R.R. 4:77-16 in order to sustain the writ of attachment against a motion to vacate, are permissible once the case has been removed to the Federal District Court. Three cases and 28 U.S.C. § 1450 are dispositive of this question. The statute reads:

> "§ 1450. ATTACHMENT OR SEQUESTRATION: SECURITIES
>
> "Whenever any action is removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant in such action in the State court shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the State court.
>
> "All bonds, undertakings, or security given by either party in such action prior to its removal shall remain valid and effectual notwithstanding such removal.
>
> * * *"

The meaning of this section is construed in *Hisel* v. *Chrysler Corporation*, D. C. Mo. 1950, 90 F. Supp. 655 and *Tanko* v. *Saperstein*, D. C. Ill. 1957, 149 F. Supp. 317. Both cases concerned suits initiated by attachment proceedings in the State court which, when removed to the District Court, were challenged on the ground that the attachment pro-

ceedings were defective. In each case the District Court looked to and relied upon the State law to determine the validity of the attachment. In the *Hisel* case the writ was found to be defective by State law, the Court saying, at p. 658:

> "Said statute [28 U.S.C. §1450] preserves rights acquired under a writ of attachment as they existed in the state court at the time of removal, and, after removal, the Federal Court can only proceed thereon in the same manner that further proceedings might have been had in the state court."

In the *Tanko* case a requested amendment to the writ was allowed as one allowable under State law, the Court saying, at p. 323:

> ". . . [I]f the attachment proceedings completed in the state court do not fully comply with state law at the time of removal, the attachment may be perfected in the Federal court. * * * Any other rule would leave the plaintiff prejudiced by virtue of the removal. * * *.
>
> "The principle that emerges from these decisions is that attachment proceedings may not be commenced anew in the Federal court after removal, but that an imperfect attachment can be validated in a Federal court. In determining what constitutes the prohibited issuance of new attachment process, on the one hand, and what amounts merely to permissive perfection of the attachment, on the other, state law should furnish the guides."

Accordingly, since the New Jersey Rules of Court specify that amendments and additional affidavits may be allowed to sustain the writ, the totality of the proof before the Court is available for the support of a *prima facie* case.

We may now revert to the contentions of the defendant Foundation. It argues that the writ of attachment issued by the State Court has not extended the jurisdiction of this Court to Foundation because the writ was not issued in conformity with applicable New Jersey statutes and rules of court. The New Jersey Attachment statute is the sole source of the remedy by attachment, and this Court's jurisdiction in an action removed from the State court, where it had been instituted in attachment, is dependent upon the jurisdiction acquired by the State court. N.J.S.A. 2A:26-2 b provides in pertinent part that

> "b. Where the defendant . . . is a nonresident of this state, and a summons cannot be served on him in this state; * * *."

an attachment may issue out of the Superior Court upon the application of any resident plaintiff against the property, real and personal, of any such nonresident defendant. The foregoing statutory provisions have been construed by New Jersey's highest court in *Tanner Associates, Inc.* v. *Ciraldo,* (1960), 33 N. J. 51 in which the Court said, at p. 63:

> "* * * Under the former practice, and indeed under the subsections of the present statute which expressly require a claim against the defendant as a prerequisite to the issuance of a writ, N.J.S. 2A:26-2, *subs. a, c* and *d,* see *Seiden* v. *Fishtein,* 44 N. J.

Super. 370, 374 (App. Div. 1957); *Prozel & Steigman, Inc.* v. *International Fruit Distributors,* 171 F. Supp. 196, 200 (D. C. D. N. J. 1959), it was considered consistent to allow the defendant in attachment to test the merits of the plaintiff's cause of action in a limited manner and yet still remain aloof from the personal jurisdiction of the court. The substantive nature of the remedy of attachment is the same under the present statute as under the immediately preceding version. We conclude that a plaintiff, in seeking a writ of attachment under N.J.S. 2A:26-2 *subd. b,* is required to state in his affidavit sufficient facts to establish a *prima facie* cause of action against the defendant in attachment, and to include therein the other statutory requirements for the issuance of the writ."

The *quantum* of proof required for the issuance of a writ of attachment is prescribed in N.J.R.R. 4:77-7, which reads as follows:

"4:77-7 PROOF REQUIRED.

"(a) No writ of attachment shall issue except upon order of the court based upon prima facie proof of the cause of action alleged and of the grounds for issuance of the writ.

"(b) Such proof shall be by affidavit entitled in the cause. Facts alleged in the complaint may be verified by reference thereto without repetition in the affidavit. Affidavits shall comply with the provisions of Rule 4:44-4, except that facts not ascertainable on personal knowledge may be asserted on

information and belief based upon diligent inquiry recited in detail."

The Rule (4:44-4) requires that affidavits presented as evidence on motions "shall be made on personal knowledge and shall set forth any facts which are admissible in evidence and to which the affiant is competent to testify."

The moving defendant here attacks the affidavit submitted in behalf of the plaintiff on the application for the order for the writ upon the ground that critical statements therein were made neither upon the affiant's personal knowledge nor upon information and belief based upon diligent inquiry. However, in view of the Court's continuance of the argument on the pending motion to permit the plaintiff to supplement its factual representations, we must consider the totality of the statements appearing in the verified complaint and in all affidavits presented in connection with the motion. N.J.R.R. 4:77-16(b).

A detailed examination of the complaint and proofs is therefore necessary. First the complaint sets forth the contractual obligations of the defendant Foundation, which it is alleged arose when the original lease was executed by Foundation and Western Electric, i.e., that on or about December 12, 1956, Foundation contracted in writing to pay to the plaintiff commissions for services to be rendered in procuring Western Electric as a tenant for space in the building "said commissions to be in accordance with the rates and rules published by the Detroit (Michigan) Real Estate Board which were in effect at the time." The pertinent rules are then set forth in the complaint in the following excerpt, as follows:

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"2. For Negotiating Leases:

"The commission for negotiating leases shall be as follows:

"5% of the aggregate rental for one year or less, but in no instance less than one-half of the first month's rent . . . $25.00.

"On leases for more than one year 5% of the aggregate rental for the first year and 2½% of the aggregate rental for the next four years, and 2% of the aggregate rental for the next five years, and 1% of the aggregate rental for the balance of the term up to and including the 50th year.

"(See Rules 'e' to 'j' inclusive . . .)

"Lease with Privilege of Renewal.

". . . (e) Where leasee avails himself of privilege of renewal or extension of lease, or takes on additional space under provisions of original lease, the negotiating broker shall be entitled to additional compensation at same rates as applied to original case, when and as said lessee avails himself of such privileges."

As regards the leases in question, the original lease described the demised premises as the 8th and 9th floors of the building; whereas the demised premises under the subsequent lease were the 5th, 6th, 7th, 8th and 9th floors of the building. The term of the original lease was ten years from on or about April 1, 1957; that of the subsequent lease was five years from delivery of all five floors for occupancy.

Appendix D

Paragraph 3 of the original lease accords to the lessee the option to renew the lease for an additional period of five years upon the same terms and conditions, provided written notice of its election to renew is given to the lessor at least nine months prior to the expiration of the lease. The same paragraph provides:

> "The Lessor shall offer first to the Lessee, which shall have the right of first refusal, to rent any other space in the building, and available for leasing, of which the demised space is a part, which may become vacant during the term of this lease, at a rental to be agreed upon by the parties. The Lessor's offer shall be in writing and must be accepted by the Lessee by notice in writing to the Lessor within thirty (30) days after receipt of said offer."

The subsequent lease expressly provides that the original lease "is hereby terminated and is no longer of any force and effect except that any advance payments of rent made under the said lease of February 15, 1957 shall be credited to the first rental payments due or becoming due under this lease."

The most recent affidavit by one of the plaintiff's officers, Marvin Katz, states:

> "As to the 8th and 9th floors of the demised premises * * *, there is a clear inference that such letting is an exercise of the renewal privilege contained in paragraph 3 of the original lease to the extent that the term of occupancy of the said 8th and 9th floors . . . continues past April 1, 1967",

and that under the subsequent lease the same tenant has taken additional space from Foundation, in excess of that demised in the original lease, viz., the 5th, 6th and 7th floors. The premises demised in the subsquent lease aggregate 262,500 square feet, for which the lessee is required to pay for the term thereof, (which includes the cost of performance by the lessor of certain work in the demised premises), the sum of $1,975,000.

Relying upon the Rates and Rules of the Detroit (Michigan) Real Estate Board previously quoted, and reciting the further provisions thereof to the effect that commissions shall be deemed to have been earned when the price and terms are arranged between the lessor and lessee, Katz argues that "the minds of both parties . . . [have] fully met, and . . . a legally binding preliminary agreement between the parties . . . [has] been executed." The plaintiff contends that as of the date of the filing of its complaint herein, there was due and owing to the plaintiff from Foundation a further commission by reason of the provisions of the subsequent lease, and that the plaintiff had presented to the Judge of the Superior Court of New Jersey who signed the order for the issuance of the writ of attachment a *prima facie* cause of action for the recovery thereof.

In its preargument brief in support of the motion against these contentions, Foundation asserts that "Plaintiff's complaint and affidavit do not even allege or claim that the five year lease for the acquistion of the three additional floors was an availing by Western Electric of privileges under provisions of the original ten year lease. Under such circumstances, the State Court should not have as-

sumed or inferred that the five year lease was such an availing." In Mr. Katz's supplemental affidavit of November 13, 1964, to which were annexed the copies of the original and subsequent leases, he reasons (rather than states) that the amount required to be paid by the tenant under the subsequent lease constitutes in fact a portion of the rent due to the landlord under the provisions of the original lease.

Despite the supplementation of the complaint by the Katz' affidavits and the exhibits thereto annexed, it is the position of the moving defendant that three essential elements of a *prima facie* cause of action supportive of a writ are lacking, i.e., (1) the original lease did not grant to the tenant "the privilege of taking on additional space"; (2) the acqusition by the tenant of three additional floors under the subsequent lease did not constitute "an availing by Western Electric Company of privileges under provisions of the original ten year lease"; and, (3) there is no proof that the lessee exercised its option to renew on the same terms and conditions by written notice to the lessor as required by paragraph 3 of the original lease. Accordingly movant argues that this Court does not have before it all the essentials of a cause of action or the gist of an action, and therefore, that no *prima facie* case in favor of the plaintiff was made out.

However, it is perfectly clear that the original lease accorded to the lessee, Western Electric, the option of renewal for an additional period of five years upon the same terms and conditions, and obligated the lessor to "offer first to the Lessee, which shall have the right of first refusal, to rent any other space in the building, and avail-

able for leasing, of which the demised space is a part, which may become vacant during the term of this lease, at a rental to be agreed upon by the parties." All of the criteria suggested by movant for the showing of a prima facie case on the application for the writ, are here present. The original lease, admittedly negotiated through the efforts of the plaintiff, granted the tenant the privilege of taking additional space in the same building. It is also irrefutable that the tenant took additional space in the building under the subsequent lease. It is a permissible, if not a conclusive, inference that in taking this additional space the tenant availed itself of the privilege accorded to it by the provisions of the original lease. Plaintiff predicates its right to recover commissions upon the rentals to be paid under the subsequent lease upon the terms of the brokerage agreement pursuant to which the original lease was negotiated. That brokerage agreement incorporated by reference the Rules of the Detroit Real Estate Board. Those Rules provided, *inter alia*, that where the lessee avails himself of the privilege of renewal or extension of the lease or takes on additional space under provisions of the original lease, the negotiating broker shall be entitled to additional compensation, etc.

We are now called upon to determine whether the taking on of additional space by Western Electric, by availing itself of a privilege accorded to it in the original lease, was "under provisions of original lease" as that phrase is to be construed in the Detroit Real Estate Board Rules. In attempting to solve the problem posed by the foregoing query, we must consider the effect of paragraph 1 of the subsequent lease which states that the subsequent lease supercedes the original lease and terminates the orig-

inal lease and renders the original lease no longer of any force and effect. The existence of a *prima facie* cause of action in favor of the plaintiff upon the basis urged by it is not inconsistent with the meaning and intent of the language of paragraph 1 of the subsequent lease. Since we are persuaded to the inference that the entry into the subsequent lease was an exercise by the tenant of a privilege accorded to it by the provisions of the original lease, the inclusion of the additional space in the subsequent lease with the same space which had been demised by the original lease, would obviously and reasonably necessitate or render appropriate the supercession of the original lease. In so providing, the parties could not deprive the broker who negotiated the original lease from availing himself of the provisions of his brokerage agreeement with the lessor and from treating the subsequent lease as in substance an enlargement of the area demised in the original lease. *Zinn & Co.* v. *Shawnee Pottery Co.*, D. C. Ohio, 1955, 148 F. Supp. 322, affd. 6 Cir. 1956, 240 F. 2d 958. Also, although it is quite possible that a strict renewal of the original lease has not occurred, the Court must be prepared to look through the form of the transaction to its substance, *Zinn & Co.* v. *Shawnee Pottery Co.*, *supra*, and the existence and terms of the subsequent lease easily establish an inference that the subsequent lease is in fact a renewal of the original lease. I conclude, therefore, in the light of the totality of the evidence before me, that the order of the Superior Court of New Jersey which authorized the issuance of the writ of attachment must be considered as valid.

The motion to quash the writ in this case was based upon the complaint and its verifying affidavit. For the purposes

of that motion "The averments contained in such papers are to be deemed true, and all legitimate discussions and inferences from what appears in such papers must be made and construed in favor of the plaintiff, and if such papers show a prima facie case for the attachment this is sufficient." *Mueller* v. *Seaboard Commercial Corp.*, 1950, 5 N. J. 28, 32). The case pends in this Court solely by virtue of diversity of citizenship between the parties. In such a case this Court sits as another court of the State of New Jersey. The remedy by attachment derives from the New Jersey statute, N.J.S.A. 2A:26-1 *et seq.* The very first section of that statute directs that it is to be "liberally construed, as a remedial law for the protection of resident and nonresident creditors and claimants." Not only the statute itself, but the procedure prescribed for securing the writ, which is regulated by Rule N.J.R.R. 4:77, must be applied with liberality "in order to accomplish justice on the merits of the action * * *." *Hillside National Bank* v. *McGruder, supra*, App. Div. 1953, 28 N. J. Super. 340, 343. Applications for the remedy of attachment are to be construed most favorably to the plaintiff seeking the remedy. When the present motion was made the lien of the writ upon the movant's real estate had been lifted by the filing of a bond. No hardship upon the movant has resulted from the Court's allowance of the filing of supplemental evidence in the form of affidavit supportive of the *prima facie* case which the plaintiff alleged in its complaint. This Court has heard the pending motion on affidavits presented by the respective parties as the New Jersey Court would have been permitted to do under the provisions of N.J.R.R. 4:77-16(b). The validity of the order for the writ finds support in the aggregate evidence adduced by the affidavits upon the present motion.

Appendix D

I have found that the attachment action was properly and effectively instituted in the New Jersey Court, and that the order for the writ, as well as the writ itself, was legally made and effective. The execution of the writ bound the real estate levied upon, and the lien of the levy was removed from the real estate by the filing of the bond by the owner pursuant to N.J.R.R. 4:77-18. The filing of that bond did not constitute a general appearance by the property owner in the action, N.J.R.R. 4:77-18(c). The question of whether this Court or the New Jersey Superior Court secured personal jurisdiction over the moving property owner because irrelevant because, although no valid judgment *in personam* could be rendered against movant without personal service or waiver of summons and voluntary appearance, after the removal of the case to this Court from the State Court, this Court has full control of the action and jurisdiction of the subject matter thereof to the extent that the State Court had such control and jurisdicion before removal. The property which I find to have been properly attached in the State Court proceedings would, but for the bond, still be held to answer any judgment rendered against the moving defendant, but such judgment could be enforced only against the bond as the substitute for the attached property. *Clark* v. *Wells*, 1906, 203 U. S. 164. The filing of the bond pursuant to N.J.R.R. 4:77-18(c) however, removes the lien of the attachment from the real estate and obligates the principal and surety on the bond to the plaintiff to the extent of the amount of the bond, to respond to any judgment which may be recovered against the property in this cause.

The motion to dismiss the complaint and to quash the writ of attachment are denied. The plaintiff is directed to submit an order according with the determinations herein made.

REYNIER J. WORTENDYKE, JR.
Judge, United States District Court

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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 1309

THE KRESGE FOUNDATION, a Michigan corporation,
Petitioner,

vs.

LOUIS SCHLESINGER COMPANY,
a corporation of New Jersey,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

WILLIAM L. GREENBAUM,
Attorney for Respondent,
60 Park Place,
Newark, New Jersey, 07102

Of Counsel:

ROBERT S. GREENBAUM,
GREENBAUM, GREENBAUM & ROWE,
60 Park Place,
Newark, New Jersey, 07102.

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THE KRESGE FOUNDATION, a Michigan corporation,

Petitioner,

v.

LOUIS SCHLESINGER COMPANY, a corporation of New Jersey,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

Question Presented

In the procedural and factual circumstances of this case, does a disposition of the question on which the review is urged involve the presence of the special and important reasons traditionally measuring the exercise of the Court's discretion in the consideration of a Petition for a writ of certiorari?

The question upon which Petitioner seeks review is: Is federal jurisdiction which was acquired upon removal from the state court on grounds of diversity after attachment defeated by the filing of an amended complaint which sets forth the same grievance originally pleaded but in greater detail, and which amended complaint does not set forth a new and independent cause of action?

Statement of the Case

Respondent, Louis Schlesinger Company, herein referred to as "Broker" or "Plaintiff", a New Jersey corporation, licensed as a real estate broker in New Jersey, brought this action in the Superior Court of New Jersey against petitioner, a Michigan Corporation, herein also referred to as Landlord, or Kresge, or Defendant owner of a department store building in Newark, New Jersey. The suit seeks commissions alleged to be due under a commission agreement between the parties: The commissions are claimed by virtue of a 1964 lease agreement between Kresge and its tenant, Western Electric Company, Incorporated, hereinafter referred to as "Tenant", procured by Broker, which lease both (i) extended the tenancy of a 1957 lease between Landlord and Tenant, hereinafter referred to as the "early lease"; and (ii) provided for the taking of additional space by the Tenant in the same building.

The facts giving rise to the suit material to the question presented follow.

The commission agreement of December 12, 1956 includes the language of Rule (e) of the Detroit Michigan Board Rates and Rules, P. 5a.

The early lease included a clause relating to a renewal option and a right of first refusal respecting additional space in the building.

> "3. The Lessee shall have the option to renew this lease for an additional period of five years upon the same terms and conditions upon written notice thereof sent to the Lessor at 3727 Second Boulevard, Detroit, Michigan, at least nine (9) months prior to the expiration of the term of this lease. The Lessor shall offer first to the Lessee, which shall have the right of first refusal, to rent any other space in the building, and available for leasing, of which the demised space is a part, which may become vacant during the term of this lease, at a rental to be agreed upon by the parties. The Lessor's offer shall be in writing and must be accepted by the Lessee by notice in writing to the Lessor within thirty (30) days after receipt of said offer."

Tenant occupied floors 8 and 9 in the building under the early lease and in April, 1957 Kresge paid to Broker a commission for the ten year term of the tenancy aforesaid on the two floors named.

Prior to the expiration of the ten year term of the early lease, Landlord and Tenant entered into another lease agreement dated June 9, 1964 wherein the premises demised consisted of the original two floors, 8 and 9, mentioned in the early lease, and three additional floors, 5, 6 and 7 in the same building.

After Kresge failed to respond to Broker's inquiry seeking information as to the details of the June 9, 1964 lease, Broker commenced this suit on September 15, 1964 by filing the original complaint, verified by affidavit, the latter stating the amount of the commission to be $157,500.00.

The writ of attachment was thereupon issued pursuant to order of the Court and served on Defendant. Under New Jersey practice, *in rem* jurisdiction was thereby acquired. The district judge reviewed the procedural history on commencement of the action in the earlier of his two opinions, P, App. D.

Prior to filing any answer, Kresge moved to dismiss the action or quash the writ. The motion was denied and an order was entered accordingly pursuant to the opinion of the district court judge. P. App. D. p. 27a.

The present Petition focuses on the filing of the amended complaint alleging the filing thereof to constitute an act fatal to the jurisdiction of the Court.

In addition to the inaccuracies of fact in the Petition relating to the substance of the commission agreement implicitely corrected above, Broker here expressly corrects inaccuracies in Kresge's Statement of the Case as follows:

1. Kresge and Western Electric never "terminated" the lease of June 9, 1964, as stated in the Petition. The 1964 lease, dated June 9, when amended by the parties, continued to bear the June 9, 1964 date as recorded in the Office of the Register of Essex County on October 1, 1964. On the motion to dismiss in the district court, notwithstanding Broker's introduction of the recorded lease dated June 9, 1964, Petitioner did not advance to the court or Broker any claim of a prior lease agreement of the same June 9, 1964 date. The recorded June 9, 1964 document was the sole lease agreement bearing that date known to the court and the Respondent until the document unrecorded bearing the date June 9, 1964 was revealed in the course of discovery proceedings July 27, 1965, more than seven months after the district court's December, 1964 denial of the Petitioner's motion to dismiss.

2. Factually, there is only one lease transaction in 1964 and the parties to the lease as well as Chase-Newark Corporation purchaser of the fee of the leased premises and indemnitor of Kregse on claim of the Broker have always referred to "the June 9, 1964 lease" as meaning the recorded document. There never existed a September 14, 1964 lease to which reference is made in the Statement of the Case in the Petition, at page 5. Reference by Kresge to a September 14, 1964 lease is a patent attempt to mislead.

3. The proofs produced by affidavit filed in the district court on the test of the jurisdiction brought on by Kresge's motion to dismiss the action or quash the writ of attachment clearly placed the Broker's claim for the renewal *and* the taking of additional space before the court. The original complaint was filed at a time when Broker was not aware of the specific details of the lease agreement, but claimed commissions on the basis of knowledge then available.

4. The amended complaint was filed by Broker while the arguments on the motion to dismiss were under advisement by the court. Circumstances of the filing of the amended complaint are material. There was then pending before this Court, Defendant's motion to dismiss, or to quash the writ of attachment, hereinafter referred to as "Defendant's earlier motion", both on jurisdictional grounds. The motion had been served and filed with accompanying brief on October 13, 1964.

Plaintiff's brief in answer was filed and served November 4, 1964, with affidavits to buttress the position of Plaintiff on the inquiry of the court as to the existence of a *prima facie* case. The nature of the court's inquiry is more particularly set forth in the opinion of the district court on the earlier motion reported in 236 F. Supp. 373.

On November 16, 1964, Plaintiff filed an affidavit to which were annexed the early lease and the lease of June 9, 1964, which had been recorded in the Office of the Register of Essex County on October 1, 1964 in Book 4047 of Deeds for Essex County, at page 350.

On November 25, 1964, Plaintiff served and filed a supplemental memorandum in response to interest indicated by the court on November 23, 1964, at the continued hearing on the motion, as to decisions which might shed light upon the meaning of the Detroit Rules (Detroit, Michigan, Real Estate Board 1956). The supplemental memorandum invited the attention of the court to the case of *Zinn & Co.* v. *Shawnee Pottery Co.,* 148 F. Supp. 322, aff'd *per curiam* (C. A. 6), 240 F. 2nd 958 (Ohio). On page 2 of the memorandum cited, the following appears:

> "The substantive issue in which the Court is interested in this motion is severable into two propositions, i.e. (a) Is a *prima facie* case shown in the complaint and/or affidavits with respect to the Plaintiff's right to commissions based upon a renewal by the parties of the tenancy on floors 8 and 9 at 715 Broad Street, Newark, New Jersey, by virtue of the lease of June 9, 1964?; and (b) Is a *prima facie* case shown in the complaint and/or affidavits with respect to Plaintiff's right to commissions for the taking of additional space by tenant (floors 5, 6 and 7)?"

It is vital to note that without question the issue of commissions on the *renewal,* as well as the issue of commissions on the *taking of additional space,* was presented to the court prior to its decision and the said decision was made by the court *while mindful of these issues.*

Subsequent to the filing of the supplemental memorandum of the Plaintiff as aforesaid, Defendant filed a further brief, designated "Defendant's Supplemental Memorandum in Support of Motion to Quash Writ of Attachment". The Preliminary Statement in that last mentioned brief of Defendant and the argument therein clearly relate to and respond directly to the question of the existence of a *prima facie* case on both propositions advanced by the Plaintiff, i.e. (1) the commission on the renewal; and (2) the commission on the taking of additional space.

On December 9, 1964, Plaintiff served and filed a reply to Defendant's supplemental memorandum on Defendant's motion to quash the writ of attachment, accompanied by an amended complaint filed under Rule 15 (a) Fed. R. Civ. P., Appendix B, *infra*.

The memorandum filed with the amended complaint, as aforesaid, clearly states the intention of the Plaintiff. The amended complaint was filed to conform the pleadings to the proofs then already under consideration by the Court, which proofs had already been the subject of argument and briefing by both counsel.

5. Petitioner states, referring to Broker's claim in the original complaint: "Kresge had never agreed to pay such additional commissions." This appears at page 4 in the Petition. Broker claims to the contrary, asserting that the December 12, 1956 letter agreement, in fact, constitutes an agreement to pay the commissions claimed.

ARGUMENT

I

Assuming *arguendo* that the position of Kresge on the question of jurisdiction merits legal argument in the light of the facts, there is no federal question.

The disposition of the challenge to jurisdiction will turn on the facts involved, not the law. We have no quarrel as a matter of law with the proposition that if in the circumstances of this case the amended complaint set forth a new and independent cause of action, the jurisdiction acquired through attachment is defeated. Jurisdiction of the federal court having been invoked solely on grounds of diversity, the federal court sits as a state court in deciding this case. P., App. D. at p. 43a.

Petitioner is seeking *certiorari* to obtain disposition of a question which the court is to pass upon as though it were a court of the State of New Jersey.

The determination of the question: "Did the amended complaint state a new and independent cause of action?" does not fit the limited and special class of issues contemplated under Rule 19, Sup. Ct. of the U. S. Rev. Rules.

II

Assuming *arguendo* eligibility for the grant of certiorari under Rule 19, *supra*, the Petition does not advance a reason for the granting of the writ.

The ultimate issue which the Petitioner seeks to determine is whether or not the amended complaint states a new and distinct cause of action when compared to the

original complaint. The question was fully briefed in the district court on the argument of the cross motions for summary judgment. The respondent's argument to the question was reprinted for the benefit of the Court of Appeals for the Third Circuit in the Supplemental Appendix in Plaintiff's Reply Brief at p. 10a *et seq.*

In its essence, Petitioner's argument must fail since it stands only on the flimsy premise that the original pleading sought commissions for a *renewal* (two floors), whereas the amended pleading seeks commission (damages) for the renewal *and the taking of additional space.* The defense has consistently failed to recognize that the damages are claimed in both pleadings on account of a single agreement, the December 12, 1965 commission agreement, which agreement is referred to by the court below as the "letter agreement".

The more detailed delineation of the claim in the amended complaint, by specifically seeking damages for taking of the additional floors, merely gives express definition to the *damages* sought arising out of the agreement between the Landlord and Tenant in 1964.

Petitioner's repeated assertions that the amended pleading: "nearly doubled" the damages originally claimed, Petition p. 7; that the claim in the amended pleading is "twice as large", Petition p. 8; and that the "Broker here doubled the damages claimed", Petition p. 8 are unfounded. As already noted, the original complaint was filed with an affidavit alleging commission to be due in the amount of $157,500.00. On interrogatories during discovery after the filing of the amended complaint, broker claimed $178,516.87. This is exclusive of a credit due to Kresge against the claim for commissions paid in advance at commencement of the 1957 lease on the 10 year rental. The credit would partially offset broker's claim on the renewal as to

floors 8 and 9 for the period between the commencement of the 1964 lease to the contracted expiration date of the 1957 lease in 1967. It is manifest that the Petition is devoid of merit in its reliance of the "new cause of action" theory.

CONCLUSION

The respondent submits that the issue upon which the petitioner seeks review is not a federal question. In fact all authority cited to urge granting of the writ is devoid of persuasion and serves to advance Respondent's argument in pointing to the absence of any question falling within the scope of eligibility for *certiorari*.

Examination of the ultimate issue apart from any concern with Rule 19, reveals no merit. The argument raised can be disposed of with the other issues remaining to be tried in the district court pursuant to the mandate on remand ready for issuance in the U. S. Court of Appeals for the Third Circuit, but now stayed pending consideration of the Petition in this Court.

By reason of all of the foregoing, it is urged that the petition for certiorari be denied.

Respectfully submitted,

WILLIAM L. GREENBAUM,
Attorney for Respondent.

Of Counsel:

ROBERT S. GREENBAUM,
GREENBAUM, GREENBAUM & ROWE.

APPENDIX A

Complaint

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—ESSEX COUNTY

DOCKET NO. L 1534 64

LOUIS SCHLESINGER COMPANY, a corporation of New Jersey,

Plaintiff,

vs.

THE KRESGE FOUNDATION, a Michigan Corporation, and KRESGE DEPARTMENT STORE, INC., a Delaware Corporation,

Defendants.

CIVIL ACTION

Plaintiff, a New Jersey corporation, maintaining a business office at 901 Broad Street, in the City of Newark, County of Essex and State of New Jersey, complaining of defendants, says:

1. Plaintiff is a licensed real estate broker in the State of New Jersey and operates principally in the field of commercial and industrial realty.

2. The defendant, The Kresge Foundation, is a trustee corporation of the State of Michigan which is not authorized to do business in this jurisdiction.

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3. The said defendant, The Kresge Foundation, is the owner of record of a multi-story department store building in the City of Newark, New Jersey, bearing the street address of 715 Broad Street.

4. At the time of the transaction complained of hereinafter, the defendant, Kresge Department Store, Inc. was the occupant in possession of the aforementioned premises pursuant to an agreement with the defendant, The Kresge Foundation, the terms of which agreement are unknown at this time to plaintiff.

5. On or about December 12, 1956, the defendant, The Kresge Foundation, contracted in writing to pay plaintiff commissions for services to be rendered in procuring Western Electric Company as a tenant for space in the said building located at 715 Broad Street, said commissions to be in accordance with the rates and rules published by the Detroit (Michigan) Real Estate Board which were in effect at that time.

6. On or about December 12, 1956, the defendant, Kresge Department Store, Inc., contracted in writing to pay plaintiff commissions for services to be rendered in procuring Western Electric Company as a tenant for space in the said building located at 715 Broad Street, said commissions to be in accordance with the rates and rules published by the Detroit (Michigan) Real Estate Board which were in effect at that time.

7. The rules of the Detroit Real Estate Board with respect to commissions to be paid for procurement of leases, at the time immediately preceding the taking of space at 715 Broad Street, and applicable to that transaction provide as hereinafter set forth:

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"2. For Negotiating Leases:

The commission for negotiating leases shall be as follows:

5% of the aggregate rental for one year or less, but in no instance less than one-half of the first month's rent . . . $25.00

'On leases for more than one year 5% of the aggregate rental for the first year and 2½% of the aggregate rental for the next four years, and 2% of the aggregate rental for the next five years, and 1% of the aggregate rental for the balance of the term up to the and including the 50th year.
(See rules "e" to "j" inclusive . . ."

"Lease With Privilege of Renewal"

"(e) Where lessee avails himself of privilege of renewal or extension of lease, or takes on additional space under provisions of original lease, the negotiating broker shall be entitled to additional compensation at same rates as applied to original case, when and as said lessee avails himself of such privileges."

8. On or about February 15, 1957, through the negotiations of plaintiff, the Western Electric Company entered into a lease with the defendant, The Kresge Foundation, for a period of ten (10) years, covering space on the eighth and ninth floors, said term to commence on the date of delivery of one half of the leased space on the eighth floor.

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9. On or about April 12, 1957, The Kresge Foundation paid plaintiff Eighty One Thousand Five Hundred Fifty Two Dollars and Twenty Seven Cents ($81,552.27) for services rendered in connection with the successful negotiation of the aforesaid lease covering the aforesaid space.

10. On or about June, 1964 the Western Electric Company acquired as tenant additional space on the three additional floors of the building at 715 Broad Street, the precise square footage of which and precise terms of which lease agreement are unknown to plaintiff at this time.

11. On or about May 11, 1964, plaintiff, upon receiving notice of a proposed sale of the leased premises, confirmed to the defendants, Kresge Department Store, Inc., and The Kresge Foundation and other plaintiffs' right to commission in connection with the leasing of additional space to Western Electric Company.

12. Subsequently plaintiff, hearing of the lease transaction herein alleged, requested the defendants to furnish to it information as to the terms of the lease agreement.

13. The defendant, The Kresge Foundation, has failed to respond to plaintiff's inquiries.

14. The defendant, Kresge Department Store, Inc., has failed to respond to plaintiff's inquiries.

15. The defendant, The Kresge Foundation, is obligated jointly and severally with Kresge Department Store, Inc., to pay plaintiff commissions for the additional space taken by Western Electric Company, pursuant to the agreement dated December 12, 1956.

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16. The defendant, Kresge Department Store, Inc., is obligated jointly and severally with The Kresge Foundation to pay plaintiff commissions for the additional space taken by Western Electric Company, pursuant to the agreement dated December 12, 1956.

WHEREFORE, plaintiff demands judgment against defendants, The Kresge Foundation and Kresge Department Store, Inc.:

(a) for the full amount of the commissions due and payable upon the additional taking of space by Western Electric Company, as per the agreement of December 12, 1956 between plaintiff and defendants;

(b) legal interest from the date of the accrual of the defendants' obligation to pay additional commissions to plaintiff;

(c) taxed costs of suit.

GREENBAUM & GREENBAUM
Attorneys for Plaintiff
By: MARTIN C. MAYER

APPENDIX B

Amended Complaint as to Defendant, The Kresge Foundation

Plaintiff, a New Jersey corporation, maintaining a business office at 901 Broad Street, in the City of Newark, County of Essex and State of New Jersey, by way of amended complaint against the defendant, The Kresge Foundation, says:

1. Plaintiff is a licensed real estate broker in the State of New Jersey and operates principally in the field of commercial and industrial realty.

2. The defendant, The Kresge Foundation, is a trustee corporation of the State of Michigan which is not authorized to do business in the State of New Jersey.

3. The said defendant, The Kresge Foundation, on December 12, 1956, and thereafter until October 1, 1964, was the owner of record of a multi-story department store building in the City of Newark, New Jersey, bearing the street address of 715 Broad Street.

4. On or about December 12, 1956, the defendant, The Kresge Foundation, contracted in writing to pay plaintiff commissions for services to be rendered in procuring Western Electric Company, Incorporated as a tenant for space in the said building located at 715 Broad Street, said commissions to be in accordance with the rates and rules published by the Detroit (Michigan) Real Estate Board which were in effect at that time.

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5. The rules of the Detroit Real Estate Board with respect to commissions to be paid for procurement of leases, at the time immediately preceding the taking of space at 715 Broad Street, and applicable to that transaction provide as hereinafter set forth:

"Rules and Definitions

"(a) • • •

"(b) Commissions shall be deemed to have been earned when the price and terms are arranged between buyer and seller, lessor and lessee, or lender and borrower, the minds of both parties having fully met, and when a legally binding preliminary agreement bettwen the parties shall have been executed. Refusal to sign final papers, or defects in title, shall not bar agent of his commission."

"2. For Negotiating Leases:
The commission for negotiating leases shall be as follows:
5% of the aggregate rental for one year or less, but in no instance less than one-half of the first month's rent . . . $25.00

On leases for more than one year 5% of the aggregate rental for the first year and 2½% of the aggregate rental for the next four years, and 2% of the aggregate rental for the next five years, and 1% of the aggregate rental for the balance of the term up to and including the 50th year.

(See rules 'e' or 'j' inclusive)."

"Lease with Privilege of Renewal

"(e) Where lessee avails himself of privilege of renewal or extension of lease, or takes on additional

space under provisions of original lease, the negotiating broker shall be entitled to additional compensation at same rates as applied to original case, when and as said lessee avails himself of such privileges."

6. On or about February 15, 1957, through the negotiations of plaintiff, Western Electric Company, Incorporated entered into a lease with the defendant, The Kresge Foundation, for a period of ten (10) years for the eighth and ninth floors, said term to commence on the date of delivery of one-half of the leased space on the eighth floor. A copy of said lease heretofore filed in this cause is incorporated herein by reference.

7. Paragraph 3 of the lease of February 15, 1957, provides generally:

(a) A renewal option to the lessee for a renewal term of five (5) years; and

(b) A right of first refusal to the lessee to lease any additional space in the building which might become available during the term of the lease at a rental to be agreed upon by the parties.

8. On or about April 12, 1957, The Kresge Foundation paid plaintiff Eighty-One Thousand Five Hundred Fifty-Two Dollars and Twenty-Seven ($81,552.27) Cents for services rendered in connection with the successful negotiation of the aforesaid lease covering the aforesaid space.

9. On or about June 9, 1964, Western Electric Company, Incorporated, as tenant, acquired additional space on the fifth, sixth and seventh floors in the building aforesaid for

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a term of five (5) years, with two one (1) year renewal options, by virtue of a certain lease agreement dated June 9, 1964, between The Kresge Foundation as lessor and Western Electric Company, Incorporated, as lessee, a copy of which agreement heretofore filed in this cause is incorporated herein by reference.

10. The lease agreement of June 9, 1964, aforesaid further provides for a five (5) year tenancy with two one (1) year renewal options between the parties aforesaid as to the eighth and ninth floors of the premises at 715 Broad Street.

11. The plaintiff was not advised by the parties to said lease of the existence of negotiations preceding the said agreement of June 9, 1964, and was thereby excluded from taking part in any negotiations between landlord and tenant.

12. The lease agreement of June 9, 1964, was recorded in the office of the Register of Essex County on October 1, 1964, in Book 407 of Deeds of said County at pages 350, etc.

13. To the extent that the 1964 lease provides for a term beyond the expiration date of the ten (10) year tenancy provided for in the 1957 lease, such taking constitutes a renewal of the lease as to the eighth and ninth floors by the tenant exercised pursuant to the privilege of renewal in the 1957 lease.

14. The letting aforesaid as to the fifth, sixth and seventh floors constitutes the taking of additional space under the provisions of the original lease agreement of 1957.

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15. The defendant, The Kresge Foundation, pursuant to the commission agreement of December 12, 1956, and the rates and rules of the Detroit Real Estate Board incorporated therein, is obligated to pay the plaintiff commissions for the taking of additional space and for the lease renewal effected by the lease agreement of June 9, 1964.

WHEREFORE, plaintiff demands judgment against the defendant:

(a) for the full amount of commissions due and payable upon the execution of the lease agreement of June 9, 1964;

(b) legal interest lawfully accruing thereon;

(c) taxed costs; and

(d) such other relief as shall be equitable and just in the premises.

GREENBAUM & GREENBAUM
Attorneys for Plaintiff
By: ROBERT S. GREENBAUM,
A Partner